FILE COPY

FILED
AUG 18 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 275.

NEWS SYNDICATE CO. INC.,
Petitioner,

—against—

JANYCE MATTOX,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

STUART N. UPDIKE,
Attorney for Petitioner,
220 East 42nd Street,
New York 17, N. Y.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

INDEX.

PAGE

Petition for Writ of Certiorari:

Preliminary Statement 2
The Matter Involved 3
The District Court Proceedings 4
The Court of Appeals Proceedings 5
Jurisdiction to Review 7
The Questions Presented 7
The Reasons Relied On for the Allowance of the Writ 9

Brief in Support of Petition for Writ of Certiorari:

Summary of Argument 13

Argument:

POINT I—The Court of Appeals erred in failing to apply the New York "single publication" rule as the choice of law rule obligatory upon it for decision of the appeal below 15

The New York "Single Publication" Rule.. 20

POINT II—Even if there were no New York decisions squarely in point, the Court of Appeals erred below in formulating, and deciding the appeal by, an independent choice of law rule in disregard of the choice of law rule indicated by existing New York decisions 28

POINT III—The Court of Appeals erred in formulating, and deciding the appeal by, a choice of law rule which is inherently incapable of uniform application, is unpredictable and unworkable in application and is incongruous in the existing structure of substantive libel law 32

Conclusion 35

TABLE OF CASES CITED:

PAGE

Angel v. *Bullington*, 330 U. S. 183 (1947) 10n, 29

Backus v. *Look, Inc.*, 39 F. Supp. 662 (U. S. D. C., S. D. N. Y. 1941) 21

Bain, Matter of, 104 Misc. 508 (Surr. Ct. N. Y. Co. 1918) 16

Banks v. *King Features Syndicate*, 30 F. Supp. 352 (U. S. D. C., S. D. N. Y. 1939) 21, 22

Buckles v. *Ellers*, 72 Ind. 220 (1880) 24

Campbell-Johnston v. *Liberty Magazine, Inc.*, 64 N. Y. S. 2d 659 (Sup. Ct. N. Y. Co. 1945) (not officially reported), *aff'd* 270 App. Div. 894 (1st Dep't 1946), *leave to appeal denied* 270 App. Div. 988 (1st Dep't 1946) 21, 22, 24, 25, 26

Cannon v. *Time, Inc.*, 39 F. Supp. 660 (U. S. D. C., S. D. N. Y. 1939) 21

Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208 (1939). 29

Conklin v. *Canadian-Colonial Airways, Inc.*, 266 N. Y. 244 (1935) 17

Donato v. *Kiendl*, N. Y. L. J., July 27, 1948, p. 149, col. 1 (Sup. Ct. N. Y. Co.) (not officially reported), 21, 24

Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938), 2, 10n, 29, 30

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169 (1940) 29

Fried, Mendelson & Co. v. *Halstead, Ltd.*, 203 App. Div. 113 (1st Dep't 1922) 21

Fry v. *Bennett*, 28 N. Y. 324 (1863) 19

Gregoire v. *G. P. Putnam's Sons*, 298 N. Y. 119 (1948), 21, 24, 25, 26, 31

Gressman v. *Morning Journal Assn.*, 197 N. Y. 474 (1910) 19

Griffin v. *McCoach*, 313 U. S. 498 (1941) 15, 29

Guaranty Trust Co. v. *York*, 326 U. S. 99 (1945) ..10n, 29

PAGE

Hutchison v. *Ross*, 262 N. Y. 381 (1933) 17

Kennedy v. *Butler, Inc.*, 245 N. Y. 204 (1927) 23
Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941) 10n, 15, 29

Means v. *Macfadden Publications*, 25 F. Supp. 993 (U. S. D. C., S. D. N. Y. 1939) 21
Meredith v. *Winter Haven*, 320 U. S. 228 (1943) 30
Morrison v. *Smith*, 177 N. Y. 366 (1904) 19
Murray v. *Brancato*, N. Y. L. J., Feb. 24, 1942, p. 882, col. 5 (Sup. Ct. Nassau Co.) (not officially reported), *aff'd* 290 N. Y. 52 (1943), *rev'g* 264 App. Div. 862 (2d Dep't 1942) 21, 22, 24, 25

Ostrowe v. *Lee*, 256 N. Y. 36 (1931) 19, 23

Palmer v. *Hoffman*, 318 U. S. 109 (1943) 29
People v. *Bihler*, 154 App. Div. 618 (1st Dep't 1913), 19, 21, 23

Russell v. *Todd*, 309 U. S. 280 (1939) 29

Six Companies of California v. *Joint Highway Dist. No. 13*, 311 U. S. 180 (1940) 29
Smyth Sales v. *Petroleum Heat & Power Co.*, 128 F. 2d 697 (C. C. A. 3d Cir. 1942) 16, 17
Sweeney v. *Philadelphia Record Co.*, 126 F. 2d 53 (C. C. A. 3d Cir. 1942) 33, 34
Sweeney v. *Schenectady Union Pub. Co.*, 122 F. 2d 288 (C. C. A. 2d Cir. 1941) 21, 33, 34

Texas v. *Florida*, 306 U. S. 398 (1939) 16
Trowbridge, Matter of, 266 N. Y. 283 (1935) 17

United States v. *Smith*, 173 Fed. 227 (U. S. D. C., Ind. 1909) 25

Weidman v. *Ketcham*, 278 N. Y. 129 (1938) 19, 23
Weissman v. *Banque de Bruxelles*, 254 N. Y. 488 (1930) 17
West v. *American Tel. and Tel. Co.*, 311 U. S. 223 (1940) 29, 30

PAGE

Wolfson v. *Syracuse Newspapers, Inc.*, 254 App. Div. 211 (4th Dep't 1938), *aff'd* 279 N. Y. 716 (1939) .. 21

Youmans v. *Smith*, 153 N. Y. 214 (1897) 19, 23

OTHER AUTHORITIES CITED:

Beale, Conflict of Laws (1935), secs. 7.1, 7.2, p. 55.... 16

Characterization of Multi-State Libel in Conflict of Laws, 48 Col. L. Rev. 932, 934, 935 (1948) 16

Cook, Tort Liability and the Conflict of Laws, 35 Col. L. Rev. 202 (1935) 16

Cormack, Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws, 14 So. Calif. L. Rev. 220, 224 (1941) 16

Falconbridge, Conflict of Laws (1947):
Pages 36-37 17
Pages 91-94 .....16, 17

Lorenzen, Qualifications and Conflict of Laws, 20 Col. L. Rev. 247, 254-55 (1920) 16

New York Civil Practice Act:
Section 11 24
Section 51 24

Restatement, Conflict of Laws, sec. 7 16

Robertson, Characterization in the Conflict of Laws (1940):
Pages 5-10 .....16, 17
Page 94 17

Rules of Decision Act, Federal Judiciary Act of 1789, Section 34 (1 Stat. at L. 73, 92), c. 20, 28 U. S. C., sec. 1652 .....2, 2n, 8, 10, 27, 28, 29

Title 28, United States Code, section 1254, subsection 1 7

2 Rabel, The Conflict of Laws (1947), pp. 91, 93-94.. 16

60 Harvard Law Review 941 19

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .

NEWS SYNDICATE CO. INC.,
Petitioner,

—against—

JANYCE MATTOX,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, The Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, News Syndicate Co. Inc., respectfully prays for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that court, entered March 11, 1949 (R. 359),* affirming a judgment of the United States District Court for the Southern District of New York, entered September 16, 1948, in this action, in favor of respondent, and against petitioner, for $15,000 damages (R. 3, 340). A timely petition for rehearing was denied by the Court of Appeals on July 19, 1949 (R. 388); hence this application for a writ of certiorari.

---

* This and similar references are to the pages of the record.

Preliminary Statement.

The decision of the Court of Appeals below, if permitted to stand, marks a substantial return, in diversity of citizenship cases, to the injustice, confusion and mischievous results of the doctrine of independent determination of "general law" by federal courts, which prevailed prior to this Court's decision in *Erie R. Co.* v. *Tompkins* (304 U. S. 64 [1938]).

The Court of Appeals decision, if not corrected, permits District Courts, in a diversity of citizenship action, to disregard completely the policy of the law of the state in which it is sitting, evidenced by the trend of authoritative and persuasive decisions of the courts of that state in similar circumstances, and to decide the action according to its own independent concept of the "better view", except when the highest state court has specifically passed upon the precise question raised. In effect, it restores the rule of decision, so often condemned by this Court, by which the same transaction in a federal court can lead to a substantially different result from that in a state court at the election of a litigant who happens to be a non-resident, simply because of the accident of diversity of citizenship of the parties. It violates the mandate of the Rules of Decision Act,* and the salutary policy of this Court, prohibiting those courts from deciding such actions upon their independent determination of what the law should be, and requiring them to

---

* "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." (Section 34 of the Federal Judiciary Act of 1789 [1 Stat. at L. 73, 92], c. 20, 28 U. S. C., sec. 1652).

conform their decisions to the law and policy of the States in which they sit.

The Matter Involved.

The action, brought by respondent against petitioner in the United States District Court for the Southern District of New York, is for damages for alleged libel published in an issue of the New York City newspaper "Sunday News" (R. 5). Respondent is a resident of Virginia (R. 5, 7, 145-46). Petitioner, a New York corporation, owns and publishes the "Sunday News" in New York City (R. 5, 7).

The news article containing the matter complained of, was a two-page detailed account of the events leading to the conviction and execution of one J. Clifton Abdell for the premeditated murder of his wife at Norfolk, Virginia (R. 14-15, 306). It told of the official investigation by the Norfolk police, and the arrest, indictment, conviction and execution of Abdell for the murder.

The only reference in the article to plaintiff was (R. 14-15):

> "Four days after the trial's close Miss Janyce Mattox of 1307 Lafayette Blvd. created a sensation.
>
> *"She gave defense attorneys a sworn statement that on Wednesday, May 11, from the front porch of her home she had seen Abdell leave his house and, half an hour later, had seen the paperhanger, Miller, go to the door. She saw Miller knock and then carry on a conversation with someone in the doorway.*

"Here was new work for Nowitzky [of the Norfolk police].

"With a photographer and two disinterested witnesses, he went to the Mattox house. There he demonstrated that it was impossible, from the Mattox front porch, to see anyone on the Abdell front porch. He later learned that the Mattox woman had once been a patient in a mental institution."

In conclusion, the article reported that Abdell was sentenced to death and that the sentence was executed.

Respondent's complaint was based solely on the statement (R. 5-6):

"that the Mattox woman had once been a patient in a mental institution."

Petitioner's answer admitted the falsity of this charge and likewise admitted that, substantially as pleaded by the complaint, the "Sunday News" was published in New York City and circulated "in the State of New York, in the State of Virginia and in the City of Norfolk, where plaintiff resides and elsewhere" (R. 7). Neither the complaint nor the answer pleaded that respondent was known only in Virginia, or was unknown in New York; neither pleaded any reference to Virginia law.

The District Court Proceedings.

At the commencement of the trial and again following the reading of certain depositions, the trial court conferred with counsel in chambers for the purpose of ruling upon objections to portions of the

depositions (R. 18, 109-12, 287). Although it does not appear in the record, the trial court at that time raised the question whether New York or Virginia law governed the action and both counsel expressly conceded that New York law should apply. Moreover, respondent never contended, during the trial, that she was known only in Virginia or that she was not known in New York. The issue of the locale and extent of her reputation was never raised; no evidence was introduced upon that subject; and, for aught that appears in the record, it did not occur to the trial court or to counsel that this issue existed in the case. Therefore, when respondent introduced into evidence the entire national circulation of the "Sunday News", which is published in New York City and distributed throughout the forty-eight states, petitioner made no objection. Moreover, relying upon New York law, and without any reference to Virginia law, petitioner made numerous objections to the trial court's admission of other evidence of damages.

The trial occupied four and one-half days. At its conclusion, the jury found a verdict for respondent for $20,000 "as compensatory damages" (R. 304). Petitioner moved to set aside the verdict on various grounds, including the erroneous admission of evidence as to damages. The trial court granted petitioner's motion unless respondent remitted $5,000 of the damages (R. 2-3, 332-39). The remittitur was filed and judgment was entered accordingly (R. 340).

The Court of Appeals Proceedings.

Petitioner appealed to the United States Court of Appeals for the Second Circuit (R. 341). It contended that, judged by New York libel law, the trial

court had committed numerous errors in the admission of certain testimony upon the issue of respondent's damages, to the substantial prejudice of petitioner.

In briefing and arguing their respective contentions, both petitioner and respondent cited, quoted, and relied upon, decisions of the New York courts. Neither relied upon, nor referred to, Virginia law. And neither even suggested that the action was governed by Virginia law, and not by New York law.

The Court of Appeals, however, completely disregarded the parties' contentions concerning the applicable New York libel law and held, entirely upon its own initiative and independent research, that the action is governed by Virginia libel law for the asserted reason that (R. 349):

> "On the record the plaintiff was not a person of prominence and it does not appear that she was known outside of Virginia; in any event there is no suggestion that she was known in New York. Since it does not appear that she suffered any damages in that or in any other state, it was not an error for the judge to rule upon the evidence upon the assumption that the only damages were suffered in Virginia; and it is of course irrelevant that in so ruling he was not consciously following our foregoing reasoning."

Therefore, based upon its interpretation of the Virginia law of libel damages, the Court of Appeals affirmed the judgment of the District Court (R. 358).

On petition for rehearing, petitioner's principal contentions were that the decision of the Court of Appeals improperly disregarded the New York "single publication" rule governing newspaper libel which, as a choice of law rule, obliged it to apply

New York libel law only and that the choice of law rule adopted by the Court of Appeals is unworkable in practice and incongruous in the existing structure of substantive libel law.

The Court of Appeals rejected these contentions. It adhered to its decision that (R. 386):

> "since it did not appear that the plaintiff was known outside Virginia or suffered any damages except in that state, it was correct for the judge to make rulings as to the admission of evidence bearing on damages in accordance with the law of Virginia."

Jurisdiction to Review.

This Court has jurisdiction, by the provisions of Title 28, United States Code, section 1254, subsection 1, to review the judgment of the Court of Appeals. The date of the Court of Appeals judgment was March 11, 1949 (R. 360). The order of the Court of Appeals denying rehearing was filed on July 19, 1949 (R. 388).

The Questions Presented.

(1) Has the Court of Appeals decided an important question of New York law of conflict of laws governing newspaper libel originally published in New York and then circulated in other states, in a way probably in conflict with applicable New York decisions and the policy of New York libel law which they declare?

(2) Has the Court of Appeals decided an important question of federal law—as to the effect

which the Rules of Decision Act (28 U. S. C., sec. 1652) requires federal courts to give, in diversity of citizenship cases, to authoritative and considered decisions of the courts of the state in which they are sitting, which, though not upon the precise questions in the actions before them, are persuasive of the determination which the state courts would reach in the circumstances—in a way probably in conflict with applicable decisions of this Court construing the Rules of Decision Act?

(3) In a libel action by a Virginia resident against a New York publisher, based upon an article in a newspaper printed and published in New York, and from there distributed throughout the United States, must the federal court in New York apply the New York libel law that the governing law is that of the state of original publication, or must it reject the New York law, and determine that the governing law is that of the state or states wherein it finds that plaintiff is known?

(4) Has the Court of Appeals decided a question of the New York law of conflict of laws applicable to libel contained in a newspaper originally published in New York and, from New York, circulated in numerous other states, in a way so unpredictable and unworkable in application and so incongruous in the existing structure of the substantive libel law of New York as to require this Court's review of the rule that it has adopted?

The Reasons Relied On for the Allowance of the Writ.

1. The Court of Appeals has decided an important question of New York law of conflict of laws governing newspaper libel originally published in New York and then circulated in other states, in a way probably in conflict with applicable New York decisions and the policy of New York libel law which they declare.

(a) The courts of New York, including the highest court of the state, have adopted, as the substantive law of New York, the "single publication" rule that libel contained in many copies of a widely distributed issue of a newspaper, magazine or book constitutes a single wrong only, creating a single cause of action only.

(b) The "single publication" rule constitutes a judicial recognition by the courts of New York of the critical necessity that New York publishers of widely distributed newspapers, magazines and books have an ascertainable and predictable standard of conduct and liability governing the day-to-day operation of those businesses. It represents the fundamental policy of New York libel law in dealing with questions involving multistate libel and, as such, is the choice of law rule which the New York courts will apply in circumstances such as are presented in this action.

(c) By application of the "single publication" rule as the New York choice of law rule governing this action, the substantive libel law of New York, where the "Sunday News" issue complained of was originally published, governs all substan-

tive questions which may arise in the action, including questions relating to the issue of respondent's damages.

2. The Rules of Decision Act (28 U. S. C., sec. 1652), as interpreted by this Court,* requires federal courts to follow, in diverse citizenship cases, authoritative decisions of the courts of the states in which they are sitting, which, though not upon the precise questions in the actions before them, are persuasive of the determination which the state courts would reach in the circumstances.

(a) This Court has declared that, in such cases, a federal court is, in effect, only another court of the state in which it is sitting, and is bound by the Rules of Decision Act to apply the law of that state in exactly the same manner as a state court would apply it in every respect that would be controlling in an action on the same claim by the same parties in the state court.

(b) In those decisions, this Court has ruled that it is the duty of the federal court to ascertain from all available data, what the state law and state policy is, and to apply it to the case at hand.

(c) The courts of New York have unequivocally adopted the "single publication" rule with respect to multi-state libel in newspapers, magazines and books, by which the only cause of action arises from the original publication of the issue of the newspaper, magazine or book containing

---

* *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938);
Klaxon Co. v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941);
Guaranty Trust Co. v. *York*, 326 U. S. 99 (1945);
Angel v. *Bullington*, 330 U. S. 183 (1947).

that libel, and, in this action the place where that original publication took place was New York.

3. The choice of law rule formulated by the Court of Appeals in deciding the appeal below is so unpredictable and unworkable in practice and so incongruous in the existing structure of the substantive libel law of New York as to call upon this Court, in the exercise of its supervisory power, to state the conflict of law rules applicable to the publication of a libel circulated in numerous jurisdictions. Only when this Court has so stated will publishers of nationally circulated newspapers, magazines and books have an ascertainable standard of conduct and liability.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of, this Court directed to the United States Court of Appeals for the Second Judicial Circuit sitting at New York, New York, commanding that said Court certify and send up to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings heretofore had in said Court of Appeals in this cause, to the end that this case may be reviewed and determined by this Court; that the judgment of the United States Court of Appeals for the Second Judicial Circuit in this action be reversed; and that your petitioner be granted such other and further relief as may be proper.

NEWS SYNDICATE CO. INC.,
Petitioner.

By STUART NORTHALL UPDIKE,
Attorney for Petitioner,
220 East 42nd Street,
Borough of Manhattan,
New York 17, New York.

August 16, 1949.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .

NEWS SYNDICATE CO. INC.,
Petitioner,

—against—

JANYCE MATTOX,
Respondent.

BRIEF.

Summary of Argument.

Petitioner's basic contention is that the Court of Appeals erred in rejecting the substantive libel law of New York and in adopting the substantive libel law of Virginia in this case. The Court correctly determined that all conflict of laws questions must be resolved by New York choice of law rules, and that such rules establish the *lex loci delicti* as the standard of decision (R. 347). But with these fundamental propositions firmly established, the Court of Appeals erred in the following respects:

1. In the choice of law process of the federal courts in this action, only New York law governs (a) in the selection of that predominantly characteristic fact, act or event which constitutes the "wrong" and

(b) in ascertaining the place where that wrong occurred. The Court of Appeals could thus properly use only New York law in identifying and localizing the "wrong". This it failed to do.

2. By the single publication rule adopted in the decisions of New York courts, when a libel is contained in many copies of a single issue of a publication, the "wrong" consists of the original publication only.

> (a) Subsequent circulation of copies in New York or elsewhere relates only to the extent of the damages consequent upon that wrong which may be allowed under the substantive libel law of the "place of the wrong"; in no event does such circulation constitute an additional wrong, nor does any other place of wrong result from such circulation in other states.
>
> (b) The *lex loci delicti* recognized by New York courts in multi-state newspaper libel is the substantive libel law of the place of original publication only—in this case, New York only.

Yet the Court of Appeals ignored the reasoning of the settled New York law. It found a separate "wrong" in the State of Virginia and applied the substantive libel law of that State, notwithstanding that, had the action been brought in the New York courts, those courts would have clearly found a single wrong, occurring in New York alone.

3. In no event was the Court of Appeals justified in adopting an independent choice of law rule of its own devising. Even if there are no New York decisions squarely pointing to the place recognized by New York law as the place where the "wrong" occurred (and petitioner maintains that there are such

decisions), it was the duty of the Court of Appeals to ascertain from all available data, including the inferences and implications of the New York "single publication" rule, what the New York choice of law rule is, and then to apply it. Certainly the Court of Appeals is not permitted by the decisions of this Court to ignore the New York rule and prescribe a different rule, simply because of fancied superiority from the view-point of "general law".

4. The novel choice of law rule adopted by the Court of Appeals below, which requires a determination of the place or places where the plaintiff is known, is unpredictable, unworkable in practical application, and incongruous in the existing structure of the substantive libel law of New York.

ARGUMENT.

POINT I.

The Court of Appeals erred in failing to apply the New York "single publication" rule as the choice of law rule obligatory upon it for decision of the appeal below.

The problem whether the appeal was governed by the libel law of New York or by that of Virginia was raised by the Court of Appeals *sua sponte*. The Court recognized (R. 347), however, that the choice of law rules of New York are binding upon, and must be followed by, the federal courts of New York when determining conflict of laws questions (*Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 [1941]; *Griffin* v. *McCoach*, 313 U. S. 498 [1941]).

But the underlying choice of law problem could not be resolved simply by stating that "the New York courts generally accept the doctrine as to torts that the *lex loci delicti* is the standard" of "liabilities for torts committed elsewhere" (R. 347-48). This presupposes a prior determination that the tort had, in fact, been "committed elsewhere". But, in this action, that preliminary determination of the place where the tort should be considered as having been committed—the "place of wrong" which is the source of the *lex loci delicti*—was the fundamental and determinative issue. (Note, *Characterization of Multi-State Libel in Conflict of Laws,* 48 Col. L. Rev. 932, 934 [1948]; 2 RABEL, THE CONFLICT OF LAWS [1947], pp. 91, 93-94; ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS [1940], p. 5; Cook, *Tort Liability and the Conflict of Laws,* 35 Col. L. Rev. 202 [1935].)

That issue should have been decided by the law of New York exclusively. (*Matter of Bain,* 104 Misc. 508, 509-10 [Surr. Ct. N. Y. Co. 1918]; *Texas* v. *Florida,* 306 U. S. 398 [1939]; *Smyth Sales* v. *Petroleum Heat & Power Co.,* 128 F. 2d 697, 699 [C. C. A. 3d Cir. 1942]; Note, *Characterization of Multi-State Libel in Conflict of Laws, supra,* at 935; RESTATEMENT, CONFLICT OF LAWS, sec. 7; BEALE, CONFLICT OF LAWS [1935], secs. 7.1, 7.2, p. 55; FALCONBRIDGE, CONFLICT OF LAWS [1947], pp. 91-94; Lorenzen, *Qualifications and Conflict of Laws,* 20 Col. L. Rev. 247, 254-55 [1920]; Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws,* 14 So. Calif. L. Rev. 220, 224 [1941].) The Court of Appeals should have determined which of the facts involved in the action is recognized *by New York law* as the one predominantly characteristic

of—or the "wrong" in—that type of action. (*Hutchison* v. *Ross*, 262 N. Y. 381 [1933]; *Conklin* v. *Canadian-Colonial Airways, Inc.*, 266 N. Y. 244 [1935]; *Weissman* v. *Banque de Bruxelles*, 254 N. Y. 488 [1930]; *Smyth Sales* v. *Petroleum Heat & Power Co.*, 128 F. 2d 697, 699 [C. C. A. 3d Cir. 1942].) Then it should have ascertained the place where, in this action, that predominantly characteristic fact occurred. If it had done so, it would have correctly adopted the substantive libel law of that place for decision of the appeal. (FALCONBRIDGE, CONFLICT OF LAWS [1947], pp. 36-37, 91, 93-94; ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS [1940], pp. 5-10, 94; *cf. Matter of Trowbridge*, 266 N. Y. 283 [1935].) Until it had thus determined by New York law that, in this action, the fact recognized *by New York law* as the predominantly characteristic one constituting the tort or "wrong" in multi-state newspaper libel, actually had been "committed elsewhere" than New York, there was no occasion for the Court of Appeals to "inquire whether the law of New York takes, as the measure or pattern of liabilities for torts committed elsewhere, the law of the state where the wrongful conduct occurred" (R. 347).

What the Court of Appeals actually did below was to assume away that essential first step of consulting New York law to characterize the "wrong" and "place of wrong", by its unconscious misapplication of the concept of the transitory tort action. The sole function of that concept is to determine the jurisdiction of the court of the forum to hear and determine an action after all the choice of law problems have been resolved and the court has concluded that the predominantly characteristic fact in the action occurred in a state other than the forum.

Instead of resorting to New York law first to determine the predominantly characteristic fact in the action which, by New York law, constitutes the "wrong" and localizes the "place of wrong", the Court of Appeals initially assumed that, by Virginia substantive libel law, a cause of action arose in Virginia in respondent's favor from the circulation of copies of petitioner's newspaper containing the libel in Virginia (R. 348-9). It likewise assumed that, by the substantive libel law of each of the other states where copies of the newspaper circulated, separate and distinct causes of action arose there in respondent's favor resulting from the circulation in each (R. 348-9). Its basic premise was that a tort had been "committed elsewhere" and that, since libel is a transitory action and it would be an "unworkable procedure" to decide the action by simultaneous application of the substantive libel law of all those states, the question before it, under the *lex loci delicti* choice of law doctrine generally accepted by New York courts, was whether "the law of New York recognizes Virginia as the place where the wrong occurred" in this action (R. 347).

On that question the Court of Appeals declared itself unable to find applicable New York decisions (R. 348). Specifically, in denying rehearing, it said (R. 387):

> "No case has come to our attention which indicates that a court of New York * * * *would not apply the law of Virginia* with respect to damages recoverable in a libel action under circumstances like those at bar." (Emphasis added.)

It, therefore, referred to the "new approach" offered in a student Note in 60 Harvard Law Review 941, 947 "to improve the present state of the law" and to the Restatement of Conflicts (R. 348) and decided that the substantive libel law applicable to this action was not the substantive libel law of New York, as petitioner had contended before it and respondent had not contested, but the substantive libel law of Virginia. Evidently the sole reason was that, according to its own independent findings of unlitigated facts, respondent was not, on the record, a person of prominence, and "it does not appear that she was known outside Virginia; in any event there is no suggestion that she was known in New York". Hence, said the court, respondent's reputation "was damaged only in Virginia" (R. 349).

The act creating liability in libel is "publication"—communicating the written defamatory matter to *any* person or persons other than the plaintiff (*Weidman* v. *Ketcham*, 278 N. Y. 129 [1938]; *Ostrowe* v. *Lee*, 256 N. Y. 36 [1931]; *Youmans* v. *Smith*, 153 N. Y. 214 [1897]). The injury is to reputation. Here, judged by New York law, the act which created liability and the physical event giving rise to the action—the original publication of the issue of petitioner's newspaper containing the libel—occurred in New York (*Ostrowe* v. *Lee, supra; Youmans* v. *Smith, supra; Fry* v. *Bennett*, 28 N. Y. 324-30 [1863]; *People* v. *Bihler*, 154 App. Div. 618 [1st Dep't 1913]). That respondent was damaged is presumed by New York law (*Gressman* v. *Morning Journal Assn.*, 197 N. Y. 474, 480 [1910]; *Morrison* v. *Smith*, 177 N. Y. 366, 368 [1904]). In short, judged by New York law, all the elements of a complete cause of action for libel in respondent's favor occurred in New York.

The choice of law difficulty arises because here, in addition to the act and injury which created a complete cause of action in New York, petitioner circulated copies of the issue of its newspaper containing the libel in various other states, including Virginia.

Depending upon the substantive libel law and choice of law rules of each of those other states, the courts in each might recognize a distinct cause of action to have arisen in respondent's favor in each of those states resulting from the circulation there. The readers in each of them also were custodians of respondent's reputation and, by generally accepted principles of libel law, damage to respondent's reputation would be presumed to have occurred in each. Finally, to add to the complexity of the problem, all the essential operative facts—communication, defamation, injury and damage—took place in New York and in all those other states practically simultaneously.

Thus, if the approach of the Court of Appeals be adopted and the substantive libel law of each of the states in which copies of the newspaper circulated be given the same effect which it would be given in the courts of each, the New York court is compelled to decide the action by apportioning and applying the varying standards of liabilities, privilege and damages recognized in each of those states—a procedure recognized as "unworkable" by the Court of Appeals (R. 349).

The New York "Single Publication" Rule.

To meet that choice of law problem and prevent such an unworkable result, the courts of New York have adopted the "single publication" rule with respect to libel printed in newspapers, magazines and books.

For purposes of a libel action in New York, the publication of a defamatory statement in a single issue of a newspaper, magazine or book, although such publication consists of thousands of copies widely distributed, is, in legal effect, only one publication which gives rise to only one cause of action and that cause of action arises only at the time and place of original publication. (*Gregoire* v. *G. P. Putnam's Sons,* 298 N. Y. 119 [1948], and cases cited therein; *Murray* v. *Brancato,* N. Y. L. J., Feb. 24, 1942, p. 882, col. 5 [Sup. Ct. Nassau Co.] [not officially reported], *aff'd* 290 N. Y. 52 [1943], *rev'g* 264 App. Div. 862 [2d Dep't 1942]; *Campbell-Johnston* v. *Liberty Magazine, Inc.,* 64 N. Y. S. 2d 659 [Sup. Ct. N. Y. Co. 1945] [not officially reported], *aff'd* 270 App. Div. 894 [1st Dep't 1946], *leave to appeal denied* 270 App. Div. 988 [1st Dep't 1946]; *Wolfson* v. *Syracuse Newspapers, Inc.,* 254 App. Div. 211 [4th Dep't 1938], *aff'd* 279 N. Y. 716 [1939]; *Fried, Mendelson & Co.* v. *Halstead, Ltd.,* 203 App. Div. 113 [1st Dep't 1922]; *People* v. *Bihler,* 154 App. Div. 618 [1st Dep't 1913]; *Donato* v. *Kiendl,* N. Y. L. J., July 27, 1948, p. 149, col. 1 [Sup. Ct. N. Y. Co.].) Moreover, until the decision of the appeal below, that "single publication" rule of New York law had also been recognized and followed by the federal courts sitting in New York. (*Sweeney* v. *Schenectady Union Pub. Co.,* 122 F. 2d 288 [C. C. A. 2d Cir. 1941]; *Backus* v. *Look, Inc.,* 39 F. Supp. 662 [U. S. D. C., S. D. N. Y. 1941]; *Cannon* v. *Time, Inc.,* 39 F. Supp. 660 [U. S. D. C., S. D. N. Y. 1939]; *Means* v. *Macfadden Publications,* 25 F. Supp. 993 [U. S. D. C., S. D. N. Y. 1939]; *cf. Banks* v. *King Features Syndicate,* 30 F. Supp. 352 [U. S. D. C., S. D. N. Y. 1939].)

The Court of Appeals recognized the existence of that "single publication" rule of New York law, but in emasculated form, when it observed that it must "group all copies of a single issue published in one state as a single tort" (R. 348). The "single publication" rule is more thoroughgoing than that. Not only are "all copies of a single issue published in" New York grouped as a single tort, but the single cause of action created by the original publication in New York includes *all* copies of that issue circulated anywhere in the world. (*Campbell-Johnston* v. *Liberty Magazine, Inc.*, 64 N. Y. S. 2d 659 [Sup. Ct. N. Y. Co. 1945] [not officially reported], *aff'd* 270 App. Div. 894 [1st Dep't 1946]; *Murray* v. *Brancato*, N. Y. L. J., Feb. 24, 1942, p. 822, col. 5 [Sup. Ct. Nassau Co.] [not officially reported], *aff'd* 290 N. Y. 52 [1943], *rev'g* 264 App. Div. 862 [2d Dep't 1942]; *cf. Banks* v. *King Features Syndicate*, 30 F. Supp. 352 [U. S. D. C., S. D. N. Y. 1939].)

Moreover, the "single publication" rule of New York law is more than a mere procedural rule of the internal law of New York applicable only "in conjunction with the New York statute of limitations to bar recovery for libels initially published here and distributed later either here or in other states or countries" (R. 387). But the decisions of the New York courts formulating the "single publication" rule compel its application as the choice of law rule of New York law governing all conflict of laws questions which may arise in any action in New York based upon libel in newspapers, magazines or books originally published in New York and thereafter circulated in New York and in other states and countries.

The "wrong" recognized by New York law as the basis of an action for libel is *"publication"* of the defamatory writing. (*Weidman* v. *Ketcham,* 278 N. Y. 129 [1938]; *Kennedy* v. *Butler, Inc.,* 245 N. Y. 204 [1927]; *Youmans* v. *Smith,* 153 N. Y. 214 [1897].) And, in that sense, the word "publication" is a term of art. The newspaper, magazine or book is "published" as soon as it has been read by *anyone* other than the plaintiff *anywhere.* (*Ostrowe* v. *Lee,* 256 N. Y. 36 [1931]; *Youmans* v. *Smith, supra; People* v. *Bihler,* 154 App. Div. 618 [1st Dep't 1913]; *United States* v. *Smith,* 173 Fed. 227 [U. S. D. C., Ind. 1909].)

Under the "single publication" rule of New York law, the only such publication of newspapers, magazines and books containing libel which constitutes a "wrong" cognizable by New York courts is the original publication of those newspapers, magazines and books. The time when that original publication took place is the only time when the libel was "published" and the time when the only cause of action for libel accrued. By parity of reasoning, the place where that original publication took place necessarily is the only place where the libel was "published", the place where the only cause of action accrued and the place where the only "wrong" occurred for application of the doctrine of *lex loci delicti.* The subsequent circulation of the libel is recognized only as measuring the gravity of the wrong and as an element of the damages which may be allowed under the substantive libel law of the place of original publication. It does not constitute a new "wrong" or additional "wrongs" in other states where that circulation took place, upon which action can be brought in New York courts. That is the essence of the "single publication" rule.

(*Gregoire* v. *G. P. Putnam's Sons,* 298 N. Y. 119 [1948], and cases cited therein; *Murray* v. *Brancato,* N. Y. L. J., Feb. 24, 1942, p. 882, col. 5 [Sup. Ct. Nassau Co.] [not officially reported], *aff'd* 290 N. Y. 52 [1943], *rev'g* 264 App. Div. 862 [2d Dep't 1942]; *Campbell-Johnston* v. *Liberty Magazine, Inc.,* 64 N. Y. S. 2d 659 [Sup. Ct. N. Y. Co. 1945] [not officially reported], *aff'd* 270 App. Div. 894 [1st Dep't 1946], *leave to appeal denied* 270 App. Div. 988 [1st Dep't 1946]; *Donato* v. *Kiendl,* N. Y. L. J., July 27, 1948, p. 149, col. 1 [Sup. Ct. N. Y. Co.] [not officially reported]; *cf. Buckles* v. *Ellers,* 72 Ind. 220 [1880].)

The most recent exposition of the "single publication" rule by the highest New York court was in *Gregoire* v. *G. P. Putnam's Sons, supra.* There the plaintiff brought action for libel contained in copies of a book which had been distributed to various book stores in the United States within the one-year period of the New York statute of limitations. The book had been originally published more than one year prior to the commencement of the action. The New York Court of Appeals did not concern itself with the question whether, by the law of other states where copies of the book circulated within the one-year statutory period, new causes of action arose from that circulation which, even under the New York statute of limitations, would not be barred (New York Civil Practice Act, secs. 11, 51). By reference to numerous decisions dealing with the conflict of laws problem in multi-state libel, it held that the predominantly characteristic fact—the "wrong"—recognized by New York law in multi-state libel, was the original publication of the book. Therefore, it held that the action was barred even as to all copies of that issue of the book whenever and wherever distributed.

In *Murray* v. *Brancato,* N. Y. L. J., Feb. 24, 1942, p. 822, col. 5 (Sup. Ct. Nassau Co.) (not officially reported), *aff'd* 290 N. Y. 52 (1943), one cause of action was for publication of the libel in the New York Law Journal originally published in New York. Three other causes of action were for the same libel in the New York Supplement, Second Series, *originally published in Minnesota* and subsequently circulated in New York and throughout the United States. The plaintiff complained of the "general distribution" of both. The New York courts held that New York law governed as to the publication in the New York Law Journal. As to the publication in the New York Supplement, Second Series, however, *they held that the "wrong" was committed and the cause of action arose in Minnesota so that Minnesota law governed.*

The decision of the Court of Appeals below cannot be reconciled with the choice of law principles thus necessarily involved in the *Gregoire* and *Murray* decisions by the New York courts. Even closer in point was the decision in *Campbell-Johnston* v. *Liberty Magazine, Inc.,* 64 N. Y. S. 2d 659 (Sup. Ct. N. Y. Co. 1945), *aff'd* 270 App. Div. 894 (1st Dep't 1946).

Review of the record and briefs on appeal in the *Campbell-Johnston* case discloses that the plaintiff there was a British citizen, born of British parents in England, residing in England and then serving in the British Army in Europe. He was widely known in England but had no friends or relatives in New York. The article in Liberty magazine of which he complained referred to him as a British subject and charged him with acting as an agent of an enemy of England. The issue of Liberty containing that article had been originally published in New York more than

one year before the action was commenced but copies had been circulated in England for the first time within the one-year period of the New York statute of limitations.

The record and appeal briefs also show that Campbell-Johnston had first sued in England upon the libel but had failed to obtain jurisdiction of the defendant or its property. Then he brought action in New York upon an assertedly transitory cause of action which the English courts would recognize as having accrued *in England* within the one-year period of the New York statute of limitations, as a result of the circulation in England where alone he was known. That cause of action, he claimed, was distinct from the cause of action resulting from the New York publication and was not barred, since the one-year period from the initial circulation *in England* had not expired.

Thus there was present in that action every element upon which the Court of Appeals relied in discarding the substantive libel law of New York—the place of original publication—and in adopting the substantive libel law of Virginia as controlling. Based upon the choice of law rule adopted by the Court of Appeals, Campbell-Johnston should have prevailed, but he did not. The New York courts held that only one cause of action arose from the entire issue of the magazine, wherever and whenever circulated. That cause of action, it held, arose in New York when the issue was originally published. And significantly the *Campbell-Johnston* decision was one of those upon which the New York Court of Appeals relied in *Gregoire* v. *G. P. Putnam's Sons*, 298 N. Y. 119, 123-24 (1948).

To summarize, whatever may be the rule in other jurisdictions, in New York the significant or predominantly characteristic fact in multi-state newspaper libel which constitutes the "wrong", and the only "wrong", is the original publication of the issue of the newspaper containing the libel. The place where the wrong occurred for choice of law purposes under the doctrine of *lex loci delicti,* is the place where that issue of the newspaper was originally published—in this action, at New York City. The physical location of the plaintiff, the place of her residence, the place or places where she is known and the circulation of that issue of the newspaper in other jurisdictions are all immaterial in the choice of substantive libel law for decision of the action. Those considerations are relevant only in ascertaining the extent of damage under applicable principles of the substantive libel law of the place of original publication. There is but one tort and but one cause of action. In this case, the issue of petitioner's newspaper containing the libel was originally published in New York. The only cause of action recognized by New York law arose in New York and the substantive libel law of New York only applies for decision of that cause of action.

The obligation of the Court of Appeals, under the Rules of Decision Act (28 U. S. C., sec. 1652), was to decide the appeal as submitted to it under the substantive libel law of New York. In failing to do so, the Court of Appeals committed error requiring reversal.

POINT II.

Even if there were no New York decisions squarely in point, the Court of Appeals erred below in formulating, and deciding the appeal by, an independent choice of law rule in disregard of the choice of law rule indicated by existing New York decisions.

In deciding the appeal below, the Court of Appeals declared that there were no New York decisions squarely pointing to the place recognized by New York law as "the place where the wrong occurred" in this action (R. 348). Therefore, it decided, by application of an independent choice of law rule of its own devising, that the wrong occurred in Virginia, and that the action was governed by the substantive libel law of that state.

In reaching that decision, the Court of Appeals did not ascertain and apply the choice of law rule which authoritative decisions in analogous circumstances indicate as the New York rule.

In so doing, the Court of Appeals failed to meet the obligation cast upon it by the Rules of Decision Act (28 U. S. C., sec. 1652) and the decisions of this Court construing that Act.

The Rules of Decision Act directs that:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

This Court has repeatedly held that the ideal sought by that Act is a uniformity of result within a state, whether the action be brought in the federal court, under diversity of citizenship jurisdiction, or in the state court one block away. In effect, this Court has said, the federal court, where diversity exists, is only another court of the state in which it is sitting and, as such, is required by the Rules of Decision Act to follow the law and policy of that state, whether expressed in statutes of the state or decisions of its courts. (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64 [1938]; *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208 [1939]; *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487 [1941]; *Griffin* v. *McCoach,* 313 U. S. 498 [1941]; *Palmer* v. *Hoffman,* 318 U. S. 109 [1943]; *Guaranty Trust Co.* v. *York,* 326 U. S. 99 [1945]; *Angel* v. *Bullington,* 330 U. S. 183 [1947].)

That doctrine has been expressly applied to conflict of laws questions. (*Klaxon Co.* v. *Stentor Electric Mfg. Co., supra; Griffin* v. *McCoach, supra.*) Moreover, the doctrine is not limited to decisions of the highest court of the state. If the highest state court has not ruled upon the precise question before the federal court in a diversity of citizenship case, this Court has held that the federal court is obliged to give the effect of law to authoritative and well considered decisions of the lower state courts unless it is convinced by persuasive data that the highest court of the state would decide otherwise. (*West* v. *American Tel. and Tel. Co.,* 311 U. S. 223 [1940]; *Six Companies of California* v. *Joint Highway Dist. No. 13,* 311 U. S. 180 [1940]; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169 [1940]; *Russell* v. *Todd,* 309 U. S. 280 [1939].)

Finally, in *Meredith* v. *Winter Haven*, 320 U. S. 228 [1943], this Court held that the doctrine first expounded in *Erie R. Co.* v. *Tompkins, supra,* placed upon federal courts deciding diversity of citizenship cases, the responsibility for determining and applying state law in all cases within their jurisdiction in which federal law does not govern, with the aid of such materials for decision as are at hand for determining state law, whether or not there were any authoritative decisions by state courts on the subject. As it had stated earlier in *West* v. *American Tel. and Tel. Co.* (311 U. S. at 237):

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' * * *."

Had the Court of Appeals below complied with that direction, it could not have formulated, and decided the appeal by, a novel choice of law rule which depends upon a prior ascertainment of the place or places where the plaintiff was known. Certainly there has been no suggestion of such a rule by any New York court.

The duty of the Court of Appeals was not to apply any choice of law rule, not positively prohibited by New York law, which accorded with its independent views of what the law should be, but to ascertain affirmatively what the New York law itself actually is with respect to the choice of law problem presented. That the Court of Appeals made little effort to comply with that duty is evident from its opinions.

No New York decision or statute was even cited or discussed in its first opinion upon the problem of localizing the "place where the wrong occurred"—the central choice of law problem on the appeal. Its opinion on rehearing refers to *Gregoire* v. *G. P. Putnam's Sons,* 298 N. Y. 119 [1948], and the cases there cited, but only to sustain the negative finding that "no case has come to our attention which indicates that a court of New York * * * would not apply the law of Virginia" (R. 387).

But the New York decisions adopting the "single publication" rule as to libel in newspapers, magazines and books, are of general application, and indicate that New York would not apply Virginia law in such a case. Those decisions show a practical realization of the radical changes which have been brought about by modern methods of mass publication and nation-wide distribution of printed information. They provide an ascertainable and predictable standard to guide newspaper, magazine and book publishers, while affording adequate relief to persons injured by libel in those publications. The reasons behind the policy which they express are as valid in determining the body of libel law which shall be applied in deciding an action for libel in those newspapers, magazines and books as in determining the length of time for which the publisher shall continue liable for it.

If the Court of Appeals had correctly interpreted the New York "single publication" decisions, it would not have decided the issues as submitted to it on the appeal by the substantive libel law of Virginia.

POINT III.

The Court of Appeals erred in formulating, and deciding the appeal by, a choice of law rule which is inherently incapable of uniform application, is unpredictable and unworkable in application and is incongruous in the existing structure of substantive libel law.

It is important to consider the consequences of the novel choice of law rule adopted by the Court of Appeals for decision of the appeal. If it is to stand as New York law until corrected by the courts of New York, its far-reaching effects will be felt by every New York publisher of nationally circulated newspapers, magazines and books. Certainly, until the decision of the appeal below, no New York attorney would have been warranted in advising his newspaper publisher client that his liability in libel and the extent of the damages in such an action depended upon the place or places where each person mentioned in his newspaper was known or known about. The "single publication" rule of New York law apparently precluded that result.

Examples of the numberless questions to which this decision gives rise are these:

If the libelous article is published in a New York newspaper which does not circulate in the state where the plaintiff is known or known about, has he no cause of action? If he has, what libel law applies and how is that law selected?

Is a single news article concerning United Nations activities and referring to the joint activities of a New York resident, an Idaho resident, a Russian na-

tional, an Arabian national and a French national and circulated in identical places to create entirely different rights and liabilities with respect to each of the persons named? And, in a libel action in New York based on that article in which all join as plaintiffs, is the court to ascertain and charge the jury with respect to the diverse libel law of each of the jurisdictions? Or would the place or places where the plaintiffs are known or known about be issues of fact to be determined by the jury so that the court would be required to charge that diverse libel law, and all of its ramifications of liability, privilege, rules of damage and similar matters, based upon each of the possible determinations of those issues of fact which the jury might reach?

What of the employee of the federal government principally known or known about in his home state of New Mexico but residing and working in Washington, D. C.? What libel law applies? The article might well be considered libelous in one jurisdiction and non-libelous in the other. (Compare *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F. 2d 288 [C. C. A. 2d Cir. 1941] [New York law], with *Sweeney* v. *Philadelphia Record Co.*, 126 F. 2d 53 [C. C. A. 3d Cir. 1942] [Pennsylvania law], as to the identical article.)

To a publisher or attorney confronted with these problems, the decision of the Court of Appeals offers the publisher small solace. It suggests (R. 387):

> "the single publication concept may be the only workable procedure when a plaintiff suffers damages in several states whose laws provide different measures of damages * * *."

But the publisher must have some ascertainable standard of conduct and predictable standard of liability

in advance. It is not enough to say that he should not publish libel. That which is considered libelous varies with time and place. (See the *Sweeney* cases cited *supra.*) Moreover, the privileges of publication also vary from state to state. The publisher is entitled to know what measure of libel he is dealing with and what privileges of publication are his. He also should be able to know the measure of damages he must expect in an action on an article published by him. Those are not provided by the choice of law rule enunciated by the Court of Appeals.

That choice of law rule is vulnerable on other grounds. It depends for application upon the resolution of factual issues—ascertainment of the place or places where the plaintiff was known or known about. When are those basic factual issues by which the applicable substantive libel law is determined, to be resolved, and by whom? The trial court must know the identity of the substantive libel law he is administering in order to rule on questions of evidence and trial motions and in order to charge the jury properly. When and how is he to find that out under the choice of law rule of the Court of Appeals?

Finally, the fundamental premise of that choice of law rule is alien to existing established principles of libel law relative to the proof of circulation. If the reasoning of the decision below is accepted, the only relevant circulation is that in areas where there are people who know the plaintiff or know about him. Indeed, on that reasoning, it might well be questioned whether a burden has not been cast upon the plaintiff to establish which readers of the libel knew him or knew about him, as a prerequisite to and limitation upon his recovery of any damages for the libel. That never has been the law of libel.

Conclusion.

If a District Court or Court of Appeals is bound only by rulings of the highest state court on all fours with the case at bar, and is otherwise free to follow its own predilections as to what the state law should be, then the Court of Appeals here acted quite properly, and there is no reason why this Court should exercise its powers of review.

But if the Court of Appeals here was charged with the duty of determining how the courts of New York would have decided this case, it either misapprehended that duty, or discharged it imperfectly. True, the Court made the negative finding that no state court decision forbade the result which it reached. This, however, was scarcely the equivalent of a genuine and searching effort to ascertain the policy of New York courts when confronted with similar questions, or to follow the guideposts in the form of reported state court decisions in cases which, while not identical on the facts, left no room for doubt as to how the state courts would have decided this case had suit been brought in that forum.

If the state court rule were unorthodox or unsound, the Court of Appeals' reluctance to adopt that rule could be more readily understood. But the New York single publication rule is simple, workable and fair. It means that when a plaintiff sues in the state of publication, the law of that state will be applied without confusing the issue with nice distinctions as to the situs of the plaintiff's reputation. The plaintiff is not thereby prejudiced, for the state court will ascertain the damage done to that reputation, wherever

it may exist, and award damages accordingly. Instead, the Court of Appeals here has chosen to disregard the persuasive evidence of the policy and law of the New York decisions, in favor of creating and announcing a singular rule which needlessly befogs the problem and benefits no one but the litigant who, by reason of the accident of his diverse citizenship, is fortunate enough to be able to sue in federal court.

If the Court below had followed the unmistakable trend of the New York decisions, the issues—or at least what the parties and the District Court thought were the issues—would have been decided on the basis of New York law as briefed and argued on the appeal. This Court, it is submitted, should exercise its supervisory powers not only to correct the situation produced by the rule enunciated by the Court of Appeals, but also to reaffirm the obligation of federal courts to observe state court decisions as controlling precedents.

Respectfully submitted,

STUART N. UPDIKE,
Attorney for Petitioner.